

Council on Jury Use and Management

Report and Recommendations



April 12, 2000

Council on Jury Use and Management

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Introduction

The Council on Jury Use and Management was created by resolution of the Conference of Circuit Judges ¹ in September, 1998, with the active endorsement of Chief Judge Robert M. Bell. The Council's work represents the most comprehensive study and review of jury matters undertaken in Maryland.

The Conference selected Hon. J. Frederick Sharer of the Circuit Court for Allegany County as chair of the Council. Also named to the Council were Hon. Michelle D. Hotten of the Circuit Court for Prince George's County; Hon. Dana M. Levitz of the Circuit Court for Baltimore County; and Hon. Dennis M. Sweeney of the Circuit Court for Howard County. G. Thomas Munsterman, Director for Jury Studies for the National Center for State Courts was retained to consult for the Council.

The charge of the Council was to:

Study and evaluate the utilization of juries and the conduct of jury trials in Maryland, including representativeness of the jury pool, jury selection, the trial process, juror compensation, juror comprehension in complex litigation, length of service and the jury service experience in general.

Publish and disseminate a study that will contain findings and, where appropriate, recommendations of specific ways to enhance jury trials.

Encourage and support the testing of proposed improvements through pilot projects.

Support implementation of recommendations contained in the study.

Suggest educational programs for the bench, the bar, jurors and the public concerning any prospective jury reforms.

Establish methods to periodically examine the utilization of any newly adopted rules and procedures to determine their effects and suggest modifications when necessary.

As a preliminary to the organization of the Council, judges Sharer, Hotten, Levitz and Sweeney participated in a national jury reform program sponsored by the Trial Court Leadership Center of the Superior Court of Maricopa County, Arizona.

Citizens from across Maryland were invited to join the Council, including other judges, members of the Bar, legislators, court administrators and private citizens. Several of the

¹ Created by rule of the Maryland Court of Appeals, the Conference of Circuit Judges represents the interests of the circuit courts and is a policy advisory body to the Chief Judge of the Court of Appeals, the Court of Appeals and other judicial branch agencies in all circuit court matters. The Conference is comprised of 16 members, including the circuit administrative judge from each judicial circuit and one additional judge elected from each judicial circuit.

Council's members had the experience of jury service and brought an important perspective to the work of the Council.

The Council was organized into three principal committees:

The Quality of the Jury Experience, chaired by Judge Levitz;
The Jury Pool and Summoning Process, chaired by Judge Hotten; and
Trial Procedures and Role of the Jury, chaired by Judge Sweeney.

The entire Council first met on March 15, 1999. Thereafter, the committees met regularly during the spring and summer and, on October 4, 1999, the entire Council convened to discuss the recommendations of the committees. Those discussions and recommendations were developed into a preliminary report that was presented to the Conference of Circuit Judges on October 30, 1999. Finally, the Council again met on February 14, 2000 and created this final report.

From the inception of the Council, representatives have made presentations on behalf of the Council to various community and professional groups, including the Conference of Circuit Judges, the Maryland State's Attorneys Association, the Office of the Public Defender, the Criminal Law Section of the Maryland State Bar Association, The League of Women Voters, the American Judicature Society, the Maryland Court Clerk's Association, the American Board of Trial Advocates, and on NewsNight Maryland (Maryland Public Television) and The Marc Steiner Show (WJHU).

While sensitive to the fundamental character of the jury process and the responsibility to preserve the rights of individual litigants in jury proceedings, the Council advocates ambitious and wide ranging recommendations which seek to prepare the institution for the challenges of the twenty-first century. Council recommendations involve and concern: the inclusiveness and representativeness of juror pools; the length of juror service; the management of jury trials; the deliberation processes of juries; the administrative aspects of jury management; and the accommodations provided to jurors. While much has been accomplished, there remains the need for a fuller examination and discussion of several aspects of jury use and management, as will be noted in this report.

The Council's preliminary recommendations have received the support of the majority of its members and have been discussed widely both with public forums and within the legal community. While reactions to its proposals have not warranted substantive changes to its initial recommendations, thoughtful comments have identified the need to address specific issues related to implementation.

In furtherance of the adoption of its recommendations, and as a basis of an implementation plan, the Council strongly recommends that the Conference of Circuit Judges support:

- (1) the creation of a permanent body within the judiciary to continue the work of the Council and to oversee the implementation of improvements to the system;
- and

(2) the need for testing of those recommendations which seek to alter long-valued practices through the establishment of pilot projects to acquire the necessary empirical and qualitative data to evaluate the efficacy of the change.

These two principal recommendations establish an appropriate means of advancing the work of the Council.

Quality of the Jury Experience

Employer Compensation

Employers should compensate employees called for jury service by paying the difference between the daily jury pay provided by the court and the employee's average daily rate of compensation, for at least the first three days. The Council endorses the introduction of legislation to implement this recommendation.

Facilities

Every Circuit Court should provide separate jury assembly facilities to include comfortable seating and other amenities, clean and convenient restrooms, adequate check-in area, vending machines and work area/work stations.

Juror Waiting

To minimize waiting time during the pre-trial phase of jury service, frequent communication between the jury staff and jurors as to the current status of dockets is essential.

Jurors should be advised if a significant delay is expected and, to the extent possible, the reason for delay.

Jurors should be released as soon as possible once it is determined that their service is not required for that day.

Jury commissioners and jury clerks should be trained by the Administrative Office of the Courts on ways to effectively implement this recommendation.

Day Care

Courts should be encouraged to adopt procedures to facilitate solutions to child care and elder care problems of prospective jurors. The judge and court staff should be mindful of, and give serious consideration to, the child care and elder care problems of jurors.

Commentary

Courts have, in large jurisdictions, created day care centers in courthouses and judiciary buildings. In smaller jurisdictions, courts have created cooperative arrangements with nearby (and licensed and certified) day care centers for prospective jurors who wish to take advantage of such services.

Judges Speaking to Jurors Post Trial

Judges should be encouraged to meet with jurors immediately before releasing them post-verdict:

- to personally thank the jurors for their service;

- To release the jurors from prior admonitions, i.e., not discussing the case, reading or watching broadcasts about the case.

- to tell them that they are free to discuss the case with anyone they wish, including the attorneys, or to not discuss the case.

- to advise them of their obligations as to further jury service.

Judges should not comment as to the judge's personal opinion about the jury's verdict.

Post Trial Services

Judges should be encouraged to provide post verdict counseling by qualified mental health professionals in appropriate cases for any jurors who wish such service.

Trial Procedures and the Role of the Jury

Jury Selection Issues

Peremptory Challenges - Election Law

The large number of peremptory challenges (40) for election law criminal offenses (see Rule 4-313) should be reduced and made consistent with the number of challenges for other criminal cases.

Advance Written Questionnaires

Where feasible, and in appropriate cases, advance written questionnaires for jury panels should be utilized.

Commentary

Questionnaires can provide information in a more efficient form and with less invasion of juror privacy. (e.g. whether a juror has been charged with a crime or has been the victim of a crime.) Advance written questionnaires can be especially useful in protracted or complex cases where jury selection will require prospective jurors to answer many questions. They may also be useful in more routine cases where jurors are asked certain standard questions.

Mini-Opening Statements

Mini-opening statements by counsel to the entire jury array in advance of questioning should be encouraged.

Commentary

This procedure allows the counsel at an early stage to introduce themselves and their case to the jury array and allows the array to be better informed before the jury selection process begins. It should be brief (a minute or two) and non-argumentative.

Language

A concerted effort should be made by appellate and trial judges, lawyers and court personnel to eliminate the use of the archaic term “voir dire”, since it is unnecessary and mystifying to potential jurors, litigants and other lay people. The term “jury selection” should be

consistently used instead. Note: Maryland Rule 2-512(d) refers to the process as “examination of jurors.”

Commentary

The use by the legal community (judges and lawyers) of the term “voir dire” rather than “jury selection” serves no purpose and has the effect of confusing lay persons, particularly jurors. An effort should be made to refrain from using the term in the hope that it eventually will pass from our legal vocabulary.

Peremptory Challenges - General

The Council has not developed recommendations on (a) the numbers of peremptory challenges that ought to be permitted; (b) who should conduct the questioning of prospective jurors; and (c) racial and sexual discrimination in jury selection (Batson issues). We have discussed these issues vigorously and at some length but have not developed specific recommendations to this date. We believe it would be productive for the judiciary to continue research and discussion on these topics.

Trial Issues

Juror Questions

Jurors should be allowed to pose questions for witnesses under controlled circumstances.

While a majority of the Council endorses juror questioning of witnesses, a minority of members opposes the process. This is a subject that may be appropriate for testing in a pilot project under the auspices of the judiciary.

Commentary

The subcommittee feels that jurors should be provided a mechanism that allows them to pose questions to witnesses under close judicial supervision. Questions by jurors would first be submitted to the judge for review. Jurors would receive an instruction that would stress that ordinarily the attorneys should ask the questions, and that if a juror does pose a question, the judge may decide that the question is not proper for legal, evidentiary, or other reasons. Counsel would have a full opportunity to object to the question at a bench conference or outside the presence of the jury. The judge would have to be a careful gatekeeper on juror questioning and would have the discretion to end submission of questions in a particular case if the process is disruptive or counterproductive to a fair trial.

Juror Discussion

In all cases, jurors should be permitted to discuss the evidence and testimony during the course of the trial, provided that all jurors are present for the discussion and the jurors are instructed to keep an open mind and to not form final opinions before the deliberation stage.

While a majority of the Council endorses juror discussion, a minority of members opposes the process. This is a subject that may be appropriate for testing in a pilot project under the auspices of the judiciary.

Commentary

Allowing jurors to discuss the evidence and testimony during trial has been tried in civil cases in several states, and the results have been viewed as successful. It is widely suspected that despite the court's admonitions, jurors do discuss the evidence and testimony during the course of trial. Allowing the jurors to engage in such discussions would recognize the natural tendency for jurors to do this and would allow them to efficiently utilize the time they spend waiting. Jurors must be instructed at the beginning of the trial that while such discussions may take place, they should keep an open mind and not reach any conclusions until they have heard all of the evidence.

Verdict Sheets

In appropriate cases, jurors should be provided with verdict sheets at the beginning of trial so they are aware of the precise question(s) they will have to resolve.

Commentary

Oftentimes, jurors have no idea during the trial, or even until deliberation, as to the questions that they will be called on to decide. This can cause unnecessary anxiety for jurors, and they are not able to focus on the core issue when they are hearing testimony or argument. Providing jurors with verdict sheets at the beginning of trial can assist them. We are mindful that there will be cases where this procedure would not be productive and could potentially prejudice the end result. The judge should employ this procedure only after consultation with counsel.

Juror Notebooks

In cases where documentary evidence is voluminous, jurors should be provided with individual notebooks and copies of the documents for individual review and notation during the course of the trial.

Commentary

This procedure is often done in products liability and medical malpractice cases.

Jury Instructions - Case Initiation

In appropriate cases, jurors should receive substantive instructions on the law at the beginning of the trial and, where feasible, be provided with copies of these instructions.

Commentary

While this procedure is permitted by current law, it does not appear that jurors often get substantive guidance on the law at the beginning of the case — for example, in an auto tort case, a definition of negligence. This can leave the jury adrift. The Council believes that, to the extent feasible, such basic instructions can and should be given. At the same time, the Council does recognize that in many cases instructions will need to be developed as the trial proceeds.

Alternate Jurors

In civil cases where alternate jurors are selected, they should not be designated as such. When alternates remain at the time of deliberation they should be allowed to fully deliberate and participate in the verdict.

Commentary

Jurors who are selected as alternates invest considerable time and effort in understanding the case, thinking about it and writing notes. To summarily dismiss the juror at the conclusion of closing argument seems wasteful and at times insulting to the valuable investment the juror has made. It is recommended that in civil cases, these alternates be treated as jurors and continue with the case through deliberation until a verdict is reached.

Interim Summation

In complex and lengthy cases, the court should allow counsel to present interim summations at appropriate stages in the trial to assist the jury's comprehension.

Commentary

This recommendation would apply only to cases that continue for many days or for weeks, or in bifurcated cases, and where there may be a need for counsel to reorient the jury, such as when a new phase of the trial is taking place.

Trial Management

Once a trial commences, the judge and counsel should manage the case to avoid lengthy periods where jurors are waiting for the proceedings to begin or continue. During the course of trial, the judge should provide the jury with periodic updates on the progress of the trial, reasons for delay and the expected time of completion.

Juror Understanding

Throughout the trial, the judge should explain to the jury the procedures and process of the trial to the jurors in terms that are understandable to the jury.

Foreperson Selection

The jury should ordinarily be allowed to select its own foreperson, unless the judge finds there is a reason to designate the foreperson.

Commentary

When, and by whom, a foreperson is designated in Maryland courts varies. Sometimes the first juror selected is the foreperson; sometimes the judge selects the foreperson; and sometimes the jury selects its foreperson. The Council believes that as part of its decisional process, it is ordinarily appropriate to allow the jury to select its own spokesperson.

Instructions and Deliberation Issues

Deliberation Guide

Jurors should be provided guidance on the process of deliberation by using a guide modeled after the American Judicature Society's "Guide for Jury Deliberations".

Commentary

The AJS "Guide for Jury Deliberations" should be adapted for use by juries in Maryland. The judge could provide the jurors with the Guide during trial so that they could familiarize themselves with the process. The Guide is posted on the AJS website and may be downloaded without copyright difficulty.

Jury Instructions

Written copies of the jury instructions should be given to the jury for their review during deliberations. If written copies are not readily available, then an audiotape should be given to the jury.

Commentary

If at all possible, written copies of the jury instructions should be provided to deliberating jurors for their review. Judges who routinely already do this find that juror questions are greatly reduced. Jurors find that they have a ready reference source on the law when discussion turns to a particular point. The advent of standardized instructions on computer discs makes the task less daunting than it would have been even a few years ago. All judges' chambers should be equipped with the capability to provide such instructions to the jury.

Verdict Sheets

Judges and attorneys should take care to have verdict sheets carefully drafted to present the issues to be decided in a clear and logical sequence and to avoid the jury unnecessarily deciding issues that do not have to be resolved.

Each juror should be given an individual copy of the verdict sheet before instructions and closing arguments so that each can focus on the precise issues to be decided.

Commentary

Judges and lawyers should take great care in preparing jury verdict sheets that clearly and logically set out the issues. It is wasteful to have jurors consider

unnecessary issues. Judges should also consider in appropriate cases having jurors resolve questions in a sequential fashion that efficiently uses their time. It would be useful for judges and counsel to have a form book of well-crafted verdict sheets as a reference tool.

Final Argument - Time Estimates

Judges should encourage counsel to voluntarily limit the time for final argument and should advise the jury of the estimates given by counsel.

Commentary

It is important to provide counsel an adequate opportunity for closing argument, but it is also important to provide jurors with guidance on how long various parts of the trial will take. Counsel should be required to fairly estimate how long their arguments will be and the jury should be told of these estimates by the judge.

Re-Closing Argument

When a deliberating jury expresses trouble on particular points or issues that are preventing them from reaching a verdict, judges, after consultation with counsel, should consider allowing brief re-closing by counsel on those subjects.

While a majority of the Council endorses this practice, a number of members representing trial counsel felt it to be inappropriate.

Commentary

When a jury expresses concern and difficulty on a particular legal or factual issue, the court should consider the option of allowing the parties to address the issue in a brief re-closing by counsel. Such an approach may prevent the jury from becoming deadlocked and assist it in understanding the issue.

Deadlocked Juries

After consultation with counsel, judges should consider assisting deadlocked juries by asking them to consider listing the issues or questions that continue to divide them so that the judge may consider clarification of instructions, provision of further instructions, read-back of testimony, re-argument, or some other device. Such requests to the jury should be accompanied by an instruction that emphasizes the non-coercive nature of the inquiry.

Commentary

Deadlocked juries are wasteful and should be avoided if there is a way to assist the jury to reach a unanimous verdict. The court should consider the devices suggested in this recommendation only after consultation with counsel and only where an appropriate instruction is given that emphasizes that the court is only attempting to assist the jury and is not attempting to coerce it to reach a verdict.

Trial Testimony

Where practically feasible and in consultation with counsel, judges should make complete trial testimony of a witness available for review by the jury in deliberation, if a request is made for it.

Commentary

Generally courts have discouraged jurors' requests to rehear the testimony of a witness. The Council felt that where a jury asks to review testimony, and where it is readily available, a reasonable request by the jury should be accommodated. While it may be technically difficult to give the jurors the testimony in some jurisdictions, others may be able to accommodate such a request by providing a tape or allowing the jurors to hear a replay in the courtroom.

Unanimous Verdicts

There is no demonstrated need at this time to depart from the long-standing tradition of unanimous verdicts in civil and criminal cases. The current option of stipulating to a less than unanimous verdict in civil or criminal cases should be explored by the judge and counsel before dismissing a jury that has not attained unanimity.

Commentary

The Council was not presented with data which indicated that deadlocked juries are such a problem that consideration should be given at this time to moving to a less than unanimous verdict for either civil or criminal cases. Useful statistics on this subject are not available at this time. Less than unanimous verdicts would be an appropriate subject for further study under the auspices of the judiciary.

General

Judicial Training

There should be specific and comprehensive training for new circuit court judges on how to conduct and manage jury trials.

Commentary

While new judges do receive some training in jury trials in the New Judge Orientation Program, the Council believes that the program should be expanded, or another program developed, to train new judges in managing and conducting jury trials. Even attorneys who have done many jury trials in practice may not be prepared for the management issues and decisions that arise for judges in taking jury trials from the pre-trial stage to conclusion. A full program on jury trials would expose the new judge/student to the best practices and would explore many of the issues of juror treatment and satisfaction that the Council has explored.

Attorney Training

There should be training for attorneys who try jury trials on how to conduct such trials.

Commentary

Just as judges need more and better training on conducting jury trials, the Council believes that attorneys should be better trained on methods of effective communication and the special issues that arise in jury trials. Hopefully with the cooperation of the judiciary, such programs could be developed with MICPEL, the Maryland State Bar Association, and other local and specialty bar associations.

Jury Bailiffs

There should be a review of how jury bailiffs are selected, trained and supervised. A state-sponsored regular training program should be considered for bailiffs.

Commentary

There is a hodge-podge of methods that courts use to provide jury bailiffs. Some courts have a dedicated employee; others utilize the judge's law clerk to perform the function. Still other jurisdictions will utilize a sheriff, clerk or other courthouse employee to perform this function on an *ad hoc* basis. The bailiff can play an important role in jury comfort and satisfaction, and the bailiff performs an important function in protecting the integrity of the jury's deliberation.

Consideration should be given to methods of training bailiffs, including the development of a handbook. Since law clerks perform the function in many jurisdictions, consideration should be given to adding a section to the law clerk orientation program on performing the bailiff role.

Cases Subject to Jury Trial

The Council has given some consideration to whether certain types of cases, e.g., workers compensation appeals, should continue to be jury trials. No recommendation is made at this time.

Jury Pool and Summoning Process

Citizen Awareness

The Council recommends the development and implementation of a statewide awareness program to educate respective communities about the jury process in an effort to encourage juror participation, to include:

an annual theme on the importance of jury duty

collaboration between the Judiciary and local boards of education to facilitate judicial visits to the schools to discuss the jury system; student poster campaigns; jury mock trial competitions

radio, television and newspaper advertisements revolving around the theme of jury service

juror exit questionnaires

press coverage of jury system initiatives

judicial speaking engagements to schools, businesses and civic groups on the importance of jury service

preparation of public service film on the day in the life of a typical juror

preparation of public service film from the Judiciary's perspective concerning the jury process

Source Lists

Juror sources should be expanded.

Commentary

Legislation should be introduced to mandate the utilization of multiple source lists to secure prospective jurors, at no charge to the judiciary. In that regard, consideration would be given to voter registration lists; the Maryland Income Tax lists; licensed drivers' list; Maryland unemployment lists; Department of Social Services lists (welfare); and public utility lists. All these lists would be used to develop master jury source lists for each jurisdiction. Additionally, a mechanism should be instituted in collaboration with each circuit court and the Administrative

Office of the Courts by which these lists are updated, and any duplications and overlaps eliminated. Selection processes should be examined to ensure that jury plans utilize the best possible random sampling of jury source lists.

Juror Information

Prospective jurors should be better prepared for service by providing them with jury duty information at the time of summoning.

Commentary

This information should focus on jury selection, the trial process, the length of service and general procedures. Additionally, information concerning jury orientation, parking and public transportation, inclement weather closings or delays; location of jury office, check-in procedures, excuse and postponement procedures and services available to the disabled. Much of this information should be placed on judiciary websites that would permit interaction between the prospective juror and the court.

Summoning

A standard combined juror qualification and summoning process should be adopted. Where appropriate utilization of bar code technology should be explored as a means to further increase effectiveness and efficiency.

Length of Service

Courts should adopt the shortest term of juror service that is consistent with the interests of justice.

Commentary

The Council endorses the use of the least invasive term for jury service, but does not recommend establishing any particular term on a State-wide basis. The needs of each court must be considered in establishing the length of terms of court.

Excuses and Postponements

Special consideration should be given to jurors having real and significant hardships, such as problems relating to child and elder care, transportation and health situations validated by a certifying physician. Excuses from, and postponement of, jury service should be considered on

a case by case basis and, if granted, should not extend beyond the length of the time necessary for that purpose.

Jury Service Statutes

Relevant provisions of existing law need to be examined for any inconsistencies, outdated information, or other conflicts with proposed recommendations. Where appropriate, corrective legislation should be drafted and introduced.

Oversight of Jury Systems

The relationship and authority of the Jury Judge and Jury Commissioner/Jury Clerk need to be examined and clarified.

Qualification

Eliminate any questions in the juror qualification form relating to race or nationality.

Council on Jury Use and Management

Addendum

Right to Trial by Jury – *de novo* appeals

The right to trial by jury in *de novo* criminal appeals from the District Court ought to be based upon the constitutional standard.

Commentary

Maryland Code, Courts and Judicial Proceedings Article, §12-401(g) provides that “[I]n a criminal appeal that is tried *de novo*, there is no right to a jury trial unless [the offense charged is subject to a penalty of imprisonment or unless] there is a constitutional right to a jury trial for that offense.” It is recommended that the General Assembly be asked to amend sub-section (g) by removing the bracketed language.